United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1117

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ROBIN YANISHEFSKY, Appellant.	Docket No. 74-1117

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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QUESTION PRESENTED

Whether appellant was denied her Fifth and Sixth Amendment rights to effective assistance of counsel.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is from a judgment of the United States

District Court for the Southern District of New York (The Honorable Inzer B. Wyatt) entered on January 18, 1974, after a trial without a jury, finding appellant guilty of possessing with intent to distribute heroin and cocaine, in violation of 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), and of introducing contraband material into a federal penal institution, in violation of 18 U.S.C. §1791, and sentencing her to two years' probation.

Prior Proceedings Before This Court

This Court relieved counsel who had represented Ms. Yanishefsky at trial, and substituted The Legal Aid Society, Federal Defender Services Appeals Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

On March 28, 1974, The Legal Aid Society filed a motion with this Court, asking that the case be remanded to the District Court for a hearing to amplify the record on the issue of competency of counsel, and that, in the event of such remand, The Legal Aid Society be relieved as counsel because of a possible conflict of interests. Appellant's position is that the record as it now exists establishes the incompetence of trial counsel, but that additional evidence of incompetence could be presented if the case were remanded for a hearing on this issue. This Court denied the motion without prejudice to renew it before the panel of this Court which hears the appeal in this case.

Statement of Facts

The original indictment in this case was filed on November 9, 1973. The Federal Defender Services Unit of The Legal Aid Society was assigned as counsel for Ms. Yanishefsky. However, because of a potential conflict of interests, The Legal Aid Society was relieved of this assignment on November 16, 1973, at which time Edward Leavy, Esquire, was substituted as Ms. Yanishefsky's counsel.

When Mr. Leavy appeared before the trial judge on November 16, 1973, he stated that he would engage in "informal discovery" with the Government, but that "should motions become necessary I will make them very promptly" (Transcript of proceedings of November 16, 1973, at 3). Later in the proceeding, the Court stated:

> ... I will still say, Mr. Leavy, that on discovery and what not if you can't work it out with the Government I will make myself available next week.

Id., at 4; see also at 3. The record and the docket sheets disclose that defense counsel made no motions on discovery or any other subject until December 3, 1973, the first day of trial.

The Government filed a superseding indictment on November 23, 1973, charging Ms. Yanishefsky with attempting to introduce five glassine envelopes of heroin and four tinfoil packets of cocaine into Federal Detention Headquarters at West Street, New York City, and with possession with intent to

distribute those narcotics.

The trial began on December 3, 1973. At the commencement of trial, defense counsel stated to the Court that although he and the Government had engaged in "informal discovery," the Government had refused his request for the names and addresses of the visitors to Federal Detention Headquarters on October 31, 1973, the date of the alleged crime. Defense counsel explained to the Court that he had sought this information because these individuals were witnesses to the events which occurred at the West Street facility on the date of the alleged incident, and that he therefore wished to interview them and possibly call them to testify for the defense (2*). The Court directed the Government to provide the names and addresses of these visitors to defense counsel (3-4). However, defense counsel never requested a continuance to interview these witnesses, stating instead that "the defendant is ready to proceed this morning" (5).

After Ms. Yanishefsky waived her right to trial by jury (5), the prosecutor made an opening statement, explaining that it was the Government's theory of the case that on October 31, 1973, as Ms. Yanishefsky left the West Street facility after a visit with inmate Roosevelt Bell, she dropped a Kool cigarette package containing several packets of drugs.

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*Numerals in parentheses refer to pages of the trial transcript.

This package was allegedly dropped through a hole in a Plexiglas plate separating a corridor through which she was passing from an adjoining room (6-7). Defense counsel then made an opening statement in which he summarized the evidence he believed the Government would present. In so doing, defense counsel conceded several critical facts on which the Government was to present no evidence or only controvertible evidence. Thus, one of the central weaknesses of the Government's case, over which Judge Wyatt repeatedly expressed concern during the trial, was what motivation Ms. Yanishefsky could possibly have had for dropping a packet of drugs into a room which inmates had no occasion to enter and, in fact, were forbidden to enter. Defense counsel's opening statement helped to fill in this gap in the Government's case by explaining to the Judge that inmates who had just had visitors would very often enter the room into which the drugs were dropped to wave good-bye or to get a last look at the visitor then passing through the corridor on the other side of the Plexiglas plate (13*). The

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*Defense counsel's opening comments on this matter were as follows:

> ... I was told that as the inmate leaves [the visitors' room] he would pass by a room [the room into which the drugs were dropped] known in West Street terminology as the bulletin board room because there is a large bulletin board in that room. The door to the back of Room A which doesn't have a mark freely swings open and closes. To get a last look at a visitor an inmate very frequently will go through

Government presented no evidence of such a practice.

Defense counsel also conceded in his opening statement that Ms. Yanishefsky was in the West Street facility on the day in question, and further claimed:

> The defendant will also show that she was visiting -- although I don't wish to make the point at this trial -- the defendant will show she was visiting with another person who had a one and a half year old child and that the two of them left the area marked hall, were buzzed through Gate 2, walked through the waiting room, the one and a half year old child walking by himself, walked out Gate D3, which could not be opened when Gate D2 was opened, enter the street, down the block to West 11th Street and did not know this indicent [sic] took place until two days later.
>
> (14).

The defense, however, presented no such evidence. In fact, it presented no evidence whatsoever.

Defense counsel then argued, somewhat incomprehensibly:

> The defendant will attempt to show that there was a security leak

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> that door which swings open and closed because the visitor will then be standing in the hallway. Very often inmates, even though improperly, it seems to be a custom and practice, will go into Room A and wave good-bye to a visiter who is ten [sic] going out the door at D2. It is at this point I believe the Government's testimony will try to show that the incident occurred.
>
> (13).

> [the hole in the Plexiglas plate] and that there was information through them that there was a security leak and something might come through. It would be entrapment and that security leak should have been repaired if there was knowledge that contraband might be passed through the break in the contraband at that point because many visitors from the outside without being searched pass that point and many inmates go into Room A. If in fact the prison officials knew that there was such a security leak anything could have been passed through that window.
>
> (14-15).

Also during his opening statement, defense counsel informed the Judge that when defense counsel had visited West Street he had not been permitted to inspect the area where the crime allegedly occurred (12, 13). Although he informed the Court of this fact, defense counsel failed to ask the Judge for an order permitting him to inspect that area or for a continuance to give him time to make such an inspection. Similarly, although defense counsel again stressed the importance of his interviewing the visitors at the West Street facility at the time of the alleged crime (13-14), he again failed to request a continuance in order to conduct such interviews.

The defense and the Government stipulated that if a chemist were called to testify he would state that the packets of powder found in the Kool cigarette package contained 0.24 grams of powder containing 25% cocaine and 0.29 grams of powder containing 4.3% heroin (18).

The Government then called Michael Garone, an officer at West Street. Garone described the floorplan of the visitors' area of the West Street facility with the aid of a diagram. According to Garone, when a visitor enters the front door from West Street, he first passes through a lobby containing a "control" room, where he registers. The visitor then passes through "Gate #1" into a "sallyport," or corridor, leading to the "visiting room," where visitors and inmates can talk to each other over a telephone. After the visit the visitor exits by re-tracing his steps, leaving the visiting room, passing through the sallyport, then through Gate #1, across the lobby, and out the front door (25). Garone also explained that adjacent to the sallyport is the "bulletin board room," which opens onto the sallyport through Gate #2. According to Garone, Gate #2 was composed of metal bars covered by a sheet of clear Plexiglas in which there was a hole about the size of a baseball (31). He testified that the bulletin board room was a "restricted" area, that prisoners were not allowed to go into the room by themselves, but that at times they tried to sneak in (27).

According to Garone, at 3:00 p.m. on October 31, 1973, he was in the bulletin board room with a prisoner, Arthur Gantt, standing in front of Gate #2, waiting for the man in the control center to unlock that gate so that he could proceed with Gantt into the sallyport. As they stood there, Garone observed 'two black women and a tall blond woman' walk

through the sallyport, pass through Gate #1, cross the front room, and exit the front door (27-28, 31-32). Although Garone at first testified that he actually saw the "tall blond woman" drop a Kool cigarette package through the hole in the Plexiglas as she passed, he later seemed to retreat from this position, implying instead that he had only observed this woman after he saw the cigarette package land at his feet. Thus, Garone testified:

> Q. ... Was she [the tall blond woman] looking at you?
>
> A. [by Garone] I don't know, sir. I just identified her through a side face as she was going out. In other words, it [the cigarette package] was dropped at my feet. I picked it up and looked.

(56). Emphasis added.

Moments later he testified in similar fashion:

> Q. ... Did you ever notice her [the tall blond woman] looking at you?
>
> A. She never looked. She was in that direction of where the bull pen is. She made the drop with her -- I imagine, I am not here to say, she made the drop into that hole and right out the front door.

(59). Emphasis added.

Thus, it appears that Mr. Garone's testimony that the tall blond woman dropped the Kool package was based on what he "imagine[d]" had happened rather than what he actually saw.

Mr. Garone testified that when he picked up the

Kool package, he discovered that it contained five cigarettes and some glassine and tinfoil packets (40). As soon as the man in the control room opened the gates, Garone walked out of the bulletin board room through Gate #2, across the sally-port, through Gate #1, and into the lobby, where he met Lieutenant Baucum (46). After telling Baucum what had happened, Garone and Baucum went out the front door of the facility to West Street, where Garone observed the blond woman and the two black women pulling away in a taxicab (47).

According to Garone, after he and Baucum re-entered the West Street facility, Baucum learned from the visiting room officer that a tall blond woman had been visiting an inmate named Roosevelt Bell. Baucum then determined from the visitors' records that one of Roosevelt Bell's visitors that day was named Robin Yanishefsky (36, 39, 84, 87, 88, 91).

In the course of his testimony, Garone identified the defendant as the "tall blond woman" he had seen at the detention facility (29). Defense counsel failed to request a hearing on this identification testimony, either before or during trial, and made no objection whatsoever to its admission. It appears, however, that Garone's in-court identification of Ms. Yanishefsky was based on an impermissibly suggestive pre-trial photographic display.* At the time Garone viewed this display, he had already described the suspect as

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*These photographs are part of the record on appeal.

a "tall blond woman" and he had already been informed that officials believed that woman to be named Robin Yanishefsky. Of the women pictured in the six photographs, two (#A-2 and #A-5) had black or dark brown hair, and were therefore clearly not similar to the description Garone had given. Two others (#A-3 and #A-4) had brunette hair, and in addition their names -- names other than Robin Yanishefsky -- were printed on the front of the photographs, thus clearly eliminating them from Garone's consideration. Of the only two remaining photographs (#A-1 and #A-6) portraying individuals with blond hair, only the photograph of appellant pictured someone with the Slavic features implicit in the name Robin Yanishefsky. Furthermore, the name Robin Yanishefsky was written on the back of her photograph. When Garone was asked why he had selected appellant's photograph, he explained:

> I was looking for a tall blond woman and the nearest or the one was 6-A [appellant's photograph], sir.
>
> (93). Emphasis added.

Thus, it appears that Garone may have been motivated to select appellant's photograph because she was "nearest" to his description of a "tall blond woman," rather than because she was the woman he had seen in the sallyport.

Despite all these factors, and the fact that Garone by his own admission had had only a fleeting glance of the tall blond woman, principally limited to the back of her head as she

was walking away from him, defense counsel made no attempt whatsoever to suppress this identification testimony.

Garone also testified that he had seen Rocsevelt Bell "peeking" into the bulletin board room earlier in the day, that Bell, when questioned, had said he was on his way to the "R and D officer" in the adjoining room, and that Garone had warned Bell at that time that the bulletin board room was a restricted area (31).

In the course of Garone's testimony, at the point when Garone claimed that the tall blond woman he later identified as Ms. Yanishefsky had dropped the drugs virtually at his feet, the Judge indicated his skepticism as to this testimony, stating:

> Mr. Garone, to me it doesn't make much sense. Why would she be throwing a package of cigarettes to somebody she didn't know?
>
> (30).*

The Government's next witness, James Baucum, the correctional supervisor at West Street, testified that on October 31, 1973, at approximately eight minutes past three, he was crossing the lobby of the facility when he was approached by Garone. After Garone showed Baucum the Kool cigarette pack containing the glassine and tinfoil packets, they both went out

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*Although Garone responded that it would have been hard for her to see him, West Street Correctional Supervisor Baucum testified later that someone standing where the woman was standing when the drugs were allegedly dropped could clearly see the guard standing on the other side of the Plexiglas plate (124).

the front door of the facility, whereupon Garone stated that he saw the woman who had dropped the package riding away in a taxi (117). Baucum could not give any description of the individuals in the taxi except that one was wearing a hat (120). Baucum also testified that the visitors' card for Roosevelt Bell indicated that, in addition to Ms. Yanishefsky, another woman, Lucy Wilson, had also visited Mr. Bell at about the same time on the afternoon of October 31 (113, 116).

The Government's next witness, Arthur Gantt, was the inmate who was in the bulletin board room with Officer Garone when the incident allegedly occurred. According to Gantt, he saw the blond woman in the sallyport make a "motion" and he saw the Kool package drop to the floor, but he did not see the blond woman in possession of the Kool package, nor did he see her drop it (134, 140-44). Although Gantt insisted that he had not seen the blond woman drop the cigarette package, defense counsel, in cross examination, repeatedly assumed that he had (142, 144), thus unnecessarily conceding one of the factual issues in the case. Thus, defense counsel, in cross-examining Gantt, asked:

> Q. And you just said that one of those women put that pack of Kools --
>
> A. [by Gantt] I didn't say anything like that.
>
> (142).

Yet moments later defense counsel, assuming the fact Gantt had just denied, asked:

Q. How soon after you saw this white woman drop the cigarettes or throw the cigarettes did Gate 1 open?

(144).

During his testimony, Gantt was also asked whether the blond woman he had seen at West Street was present in court. Gantt's response was equivocal:

A. Well, I am not sure but I think it was this lady here to the right.

THE COURT: What color dress was she wearing?

THE WITNESS: I can't identify.

THE COURT: The women that you are pointing to now.

THE WITNESS: A brown dress.

(137). Emphasis added.

Gantt then apparently selected the defendant as the blond woman.

Defense counsel again failed to request a hearing on this identification testimony, and made no objection whatsoever to its admissibility, either before or during trial. Here again, however, it appears that Gantt's hesitant identification of the defendant was based on an impermissibly suggestive pre-trial photographic display. The same photographs which were displayed to Garone were also shown to this witness. Despite their suggestiveness, Gantt was able to select only the two photographs of blond women as being similar to the woman he had seen in the sallyport. It is, of course, only

natural that Gantt, having previously described the woman as blond, should have selected the only two photos of blond women as being similar to the woman he had seen. Moreover, Gantt testified that when he was unable to choose between these two photographs, the investigators had actually pointed to the defendant's picture as being the picture of the suspect (139). Thus coached, Gantt came into court and testified that the defendant was the woman he had seen in the sallyport.

FBI Agent Bruce Brotman, the Government's last witness, testified that he arrested Ms. Yanishefsky on November 2, 1973, two days after the alleged crime (157). Upon arriving at his office, Brotman proceeded to question Ms. Yanishefsky. After giving her Miranda warnings, Brotman asked her to sign a waiver of rights form which included the statement, "I do not want a lawyer at this time" (161). Brotman admitted that Ms. Yanishefsky refused to sign this waiver (162). He claimed, however, that Ms. Yanishefsky nonetheless agreed to speak to the agents.

Going outside the record, I have learned from Ms. Yanishefsky that she had, in fact, requested a lawyer at this time, but had been refused this request. I also learned from defense counsel's file that Ms. Yanishefsky had informed defense counsel prior to trial that she had been refused her request for a lawyer at this interrogation.*

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*Appellant will argue that the record as it presently exists establishes the incompetence of trial counsel, but that if this Court should find the record to be insufficient, the

During the course of the interrogation which ensued, Ms. Yanishefsky admitted that she had been at West Street on the day of the incident, that she smoked Kool cigarettes, and that she was probably carrying Kool cigarettes when she was at the West Street facility (162-66). Despite the highly incriminating nature of these admissions, defense counsel made no motion, either before or during trial, to suppress these statements on the ground that Ms. Yanishefsky had been denied her Fifth and Sixth Amendment rights to counsel.

Brotman also testified that although the Kool cigarette package, the glassine and foil packets, and the Federal Detention Headquarters visitors' form were sent to the FBI Identification Division for testing, the only fingerprints found on any of these items were not fingerprints of Ms. Yanishefsky (173).

Defense counsel, at the beginning of trial, had refused to enter a stipulation as to the substance of the testimony which would be given by the warden of West Street if he were called as a witness. Defense counsel indicated that he wanted the warden to testify so that he might be cross-examined on whether he had been informed in advance that someone might attempt to introduce drugs into the West Street facility. At

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case should be remanded for a hearing to amplify the record. In the event of such a remand, evidence could be introduced to prove that Ms. Yanishefsky had informed her trial counsel, prior to trial, that she had requested a lawyer during this interrogation and that this request had been denied.

the end of the Government's case, however, defense counsel stipulated that the warden did not have any such knowledge (175).

After the Government rested its case, defense counsel stated:

> I haven't prepared any motions, your Honor, but briefly I would make a motion that the Government has not made out a prima facie case for various reasons which I believe in terms of the identification of -- I don't think there is a need in fact to go into why, your Honor. All the evidence was presented today. I would so move.
>
> (176).

Thus, although apparently recognizing the flaws in the critical identification testimony, defense counsel failed, even at this late date, to articulate his objections. The Court denied the motion.

At this juncture, Judge Wyatt commented, as he had earlier in the proceedings (30), on what he apparently regarded as the principal weakness of the Government's case:

> Of course, the mystery is why anybody would do such a thing [drop the Kool cigarette package containing drugs] in full view of the officer [Garone] and with no, as far as I can see, no assurance that the package would ever get to the intended beneficiary, assuming that Roosevelt Bell was the intended beneficiary. After all, he [Bell] wasn't back of the Plexiglas. So that the motivation is rather obscure.
>
> (176).

The Judge stressed, however, that if he believed Garone's testimony, he would have to find Ms. Yanishefsky guilty (176).

Court adjourned for the day after defense counsel stated he would need ninety minutes to two hours to present his case (177).

When the trial resumed the following morning, however, defense counsel stated that he would not present any witnesses (178). Instead, he requested time to prepare a post-trial memorandum of law, explaining that

> ... it was very difficult to form exactly a theory for defense and cross-examination yesterday. It's the kind of theory that I might be able to form in reading the minutes and submitting a post-trial memorandum.
>
> (178).

Defense counsel then elaborated on his theory of the case, which was that both officer Garone and inmate Gantt committed perjury on the witness stand. Concerning Garone, defense counsel theorized that Garone's testimony that he was in the bulletin board room on October 31, 1973, because he was taking inmate Gantt to the lobby, was false, that Garone was really in the bulletin board room because he had been assigned to guard the hole in the Plexiglas plate to insure that no contraband was passed through it. Furthermore, according to counsel, Garone had left his post without authorization and, upon returning, had discovered the Kool package containing the drugs lying on the floor. Then, out of fear he would get in

trouble for his dereliction of duty in allowing these drugs to be introduced into the facility while he was away from his post, Garone accused the first person he saw, who happened to be Ms. Yanishefsky, of dropping the drugs (178-80). Defense counsel had introduced no evidence to establish that Garone had been assigned to such duty on the date in question or that he had been away from his post.

Defense counsel then argued somewhat inconsistently that Garone had not seen Ms. Yanishefsky at all, but rather had accused her of dropping the package containing the drugs because there had been a rumor circulating at West Street that Roosevelt Bell would be receiving contraband and thus, when Garone returned to his post and discovered the package containing the drugs, he assumed that Bell's visitor, Ms. Yanishefsky, had dropped it (185). Again, defense counsel offered no evidence of such a rumor.

Defense counsel also argued that inmate Gantt had committed perjury on the witness stand because some "subtlety" short of a promise had been made to induce him to testify (182). Defense counsel introduced no evidence to support this contention.

Finally, defense counsel entered into a somewhat incomprehensible argument which left the impression that he was conceding Ms. Yanishefsky's guilt rather than advocating her innocence. Thus, defense counsel argued:

> I think what the Government is asking the defendant to do in this

> case, your Honor, is presenting the defense with an eyewitness testimony, forcing the defendant to take the stand and say that never happened. If in fact, your Honor, the defendant takes the stand and through cross-examination loses a case because it never happened the way the Government said it happened, it happened an entirely different way, then the defendant is in fact proving the Government's case by testifying against herself and is forced to do that because the Government comes up with perjured testimony about an eyewitness identification. I think that's abhorrent, your Honor.
>
> (185). Emphasis added.

Following this argument, the Judge denied defense counsel's request to be permitted to file a post-trial memorandum, stating that Ms. Yanishefsky apparently did smoke Kool cigarettes, that he could find no motive for officer Garone to lie, and that, although he could find no motivation for the defendant's doing what Garone accused her of doing, he felt bound to find her guilty (186).

After Judge Wyatt had rendered his verdict, defense counsel for the first time requested a court order to permit him to inspect the areas of the West Street facility where the crime allegedly occurred, explaining that West Street officials had not permitted him to do so earlier (189). The judge dismissed this request, stating that such an inspection could have no impact on the proceedings since the trial was already completed (189).

On December 12, 1973, defense counsel filed a motion

for judgment of acquittal or in the alternative for a new trial which fundamentally reiterated the arguments described above and additionally pointed out certain alleged inconsistencies in the testimony of the government witnesses. A copy of this memorandum is set forth as Document #11 of the record on appeal in this case.

On January 15, 1974, Ms. Yanishefsky wrote to the trial judge, asking him to relieve her trial counsel and assign new counsel to assist her. This letter, and a similar letter from Ms. Yanishefsky's father, dated January 10, 1974, are set forth in appellant's separate appendix as C and D, respectively. Ms. Yanishefsky's letter stated that she felt she "was not justly represented." She asserted that defense counsel, despite her objections, had failed to call an eyewitness, Ms. Lucy Wilson, who "would have sworn that I was innocent." She also pointed out that although defense counsel had not received the list of West Street visitors until after the one and one-half day trial commenced, he had not requested a postponement in order to interview these visitors in an attempt to locate those who might provide testimony exculpatory to the defendant. Finally, Ms. Yanishefsky complained of that portion of defense counsel's closing argument in which "he practically stated that I was guilty."

Ms. Yanishefsky's father's letter to the Judge raised similar issues, complaining that defense counsel had failed to call any witnesses for the defense, that the defense he did

present was "inept" and "bumbling," and that defense counsel conveyed the impression that he believed his client was guilty of the crime charged.

Defense counsel, upon receiving copies of these letters, wrote to the judge, saying he had done his best to represent Ms. Yanishefsky. Defense counsel's letter is set forth as Document #9 of the record on appeal. Defense counsel indicated, however, that he had not attempted to contact any West Street visitors until after the trial, and that even then he had only sent them letters asking them to respond.

At sentencing, the trial court treated the letters from Ms. Yanishefsky and her father as applications to relieve defense counsel and to assign other counsel to represent Ms. Yanishefsky (195). The Judge stated that on the basis of his own observations, assigned counsel was not incompetent. While ignoring several of the complaints raised by Ms. Yanishefsky and her father, the Court did state that since Lucy Wilson was the sister of Roosevelt Bell, the person Ms. Yanishefsky was alledgedly visiting on the date of the incident, Ms. Wilson was an interested witness and that the Court, therefore, would not believe her testimony if it conflicted with the testimony of officer Garone (195-96). The Court made this determination without even hearing an offer of proof concerning the proffered testimony of Ms. Wilson. The Court thereupon denied Ms. Yanishefsky's application for new counsel (196).

The Court next denied defense counsel's motion for

a judgment of acquittal or in the alternative a new trial (196).

Defense counsel then handed up a sentencing memorandum to the judge and briefly reiterated its contents orally to the court, asking that Ms. Yanishefsky be given probation rather than a term of incarceration. Despite counsel's arguments, Judge Wyatt indicated that he intended to sentence Ms. Yanishefsky to imprisonment. It was only after Ms. Yanishefsky herself argued to the Court that the judge agreed to place her on probation (198-204).

ARGUMENT

APPELLANT YANISHEFSKY WAS DENIED ADEQUATE AND EFFECTIVE REPRESENTATION BY COMPETENT COUNSEL, IN VIOLATION OF HER RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS.

The right of a criminal defendant to adequate assistance by competent counsel is assured both by the Sixth Amendment's guarantee that an accused shall "have the Assistance of Counsel for his defense," and by the Fifth and Fourteenth Amendments' guarantees of "due process of law." See, e.g., Avery v. Alabama, 308 U.S. 444 (1940).

In determining whether these constitutional protections were violated in the present proceeding, this Court must first determine the standard to be applied. In the past, numerous cases, including some from this Circuit, have held that an accused's right to counsel is satisfied unless the representation was so inadequate and incompetent as to render the trial a "farce and a mockery," so offensive to concepts of justice that it "shocks" the conscience of the Court. See, e.g., United States v. Wight, 176 F.2d 376 (2d Cir. 1949). Four Circuits, however, have expressly rejected the farce and mockery standard, holding instead that a defendant is entitled to "counsel reasonably likely to render and rendering reasonably effective assistance." Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) (emphasis added); West v. Louisiana, 478 F.2d

1026 (5th Cir. 1973); Moore v. United States, 432 F.2d 730 (3d Cir. en banc 1970); Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967); see also United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973). Expressed in different terms, this standard requires that an accused be afforded counsel of "normal competency." See, e.g., Moore v. United States, supra, 432 F.2d at 737.

These Circuits based their adoption of this more demanding standard of attorney competence on the Supreme Court's interpretations of the constitutional guarantees to assistance of counsel. Thus, the Supreme Court has expressed a "vigilant concern for the maintenance of the right of an accused to assistance of counsel" (Avery v. Alabama, supra, 308 U.S. at 445), describing this right as one of "peculiar sacredness." The Court has held that in modern times the right to competent counsel is particularly acute since it is through this counsel that the defendant acquires the "balance" adequately to confront a "prosecution by experienced and learned" professional prosecutors. United States v. Ash, 413 U.S. 300, 309 (1973). Rather than insisting that a proceeding must fall to the level of a farce and mockery before a defendant is denied his constitutional right to counsel, the Supreme Court has repeatedly held that constitutional guarantees insure "effective and substantial aid" to the accused in the preparation and presentation of his defense. See, e.g., McMann v. Richardson, 397 U.S. 759, 771 (1970); Reece v. Georgia, 350 U.S. 85 (1955); White v. Ragen,

324 U.S. 760 (1945); Glasser v. United States, 315 U.S .60 (1942); Powell v. Alabama, 287 U.S. 45 (1932).

McMann v. Richardson, supra, comes closest to expressly adopting the "normal competency" standard, holding that a defendant is entitled to "reasonably competent advice" which must at least come "within the range of competence demanded of attorneys in criminal cases." Id., at 770-71.

While numerous decisions of this Circuit refer to or rely on the farce and mockery standard, some recent opinions have indicated a trend toward a more demanding standard of defense counsel competency. Thus, Chief Judge Kaufman, dissenting in United States ex rel. Marcelin v. Mancusi, 462 F.2d 36 (2d Cir. 1972), condemned a "rigid adherence to phrases and formulas" such as farce and mockery, and urged that, at least

> ... in judging adequacy of pretrial preparation, standards of "normal competency" must prevail. Brubaker v. Dickson, 310 F.2d 30, 39 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963); Moore v. United States, [supra].
>
> Id., at 48.

Similarly, in United States v. Katz, 425 F.2d 928-30 (2d Cir. 1970), this Court, without mentioning the farce and mockery standard, referred to defense counsel's "duty of loyalty" and "elementary skill" in the defense of his client, and in Saltys v. Adams, 465 F.2d 1023, 1029 (2d Cir. 1972), this Court, again without mentioning the farce and mockery standard, found constitutional violation in the "woefully inadequate" representation

of defense counsel.

Moreover, it is significant that the District of Columbia Circuit -- the very Circuit which created the farce and mockery standard (Diggs v. Welsh, 148 F.2d 667 (D.C. Cir. 1945), cert. denied, 325 U S .889 (1945)) -- and from which this Circuit first adopted that standard (United States v. Wight, supra, 176 F.2d at 379), has now rejected it. Bruce v. United States, 378 F.2d 113 (D.C .Cir. 1967); see also United States v. DeCoster, supra; Scott v. United States, 427 F.2d 609 (D.C. Cir. 1970). At the time of the Diggs decision, the Sixth Amendment was thought to guarantee merely the formal assignment of counsel; consequently, counsel's performance after assignment was judged by the due process clause of the Fifth Amendment. The farce and mockery standard was thus originally a progeny solely of the Fifth Amendment. By default, it was eventually employed in cases applying the Sixth Amendment as well. However, in view of Supreme Court rulings subsequent to Diggs, holding that the Sixth Amendment requires not merely assignment of counsel, but rather the effective assistance of counsel, the District of Columbia Circuit, in 1967, overruled the farce and mockery standard of the Diggs decision in favor of the normal competency standard (Bruce v. United States, supra), and has subsequently noted that

> ... [w]hat is involved here is the Sixth Amendment. The Sixth Amendment has overlapping but more stringent standards than the Fifth Amendment as is clear from other contexts.

Compare, for example, United States v. Wade, 388 U.S. 293 ... (1967), with Stovall v. Denno, 388 U.S. 293 ... (1967).

Scott v. United States, supra, 427 F.2d at 610.

Further, support for the adoption of a higher standard of attorney competency is found in the fact that the Chief Justice of the United States, the Chief Judge of the Second Circuit, and the Chief Judge of the Southern District of New York, have all in recent months made speeches decrying the poor quality of performance of certain members of the federal bar and demanding the application of higher standards to prevent criminal defendants being left to the mercies of incompetent counsel. Berger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Fordham L.R. (1973); Kaufman, Address at County Lawyers' Dinner, New York Law Journal (December 7, 1973), p. 1; Edelstein, A Chief U.S. Judge Faults Competency of Trial Bar, New York Law Journal (May 1, 1973), p. 25. If these pronouncements are not to be disregarded as mere verbiage, then the federal courts must take a leading role in requiring reasonable competency of counsel who represent defendants in federal criminal proceedings.

For these reasons, this Court should reject the "farce and mockery" standard and adopt instead the normal competency standard already being applied in at least four other Circuits. Whichever standard is applied, though, it is clear

certain minimum duties which are constitutionally required of counsel on behalf of his client were not satisfied in this case. Various courts have attempted to compile lists of these duties. See, e.g., United States v. DeCoster, supra, 487 F.2d at 1203-04;* Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.),

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* In General -- Counsel should be guided by the American Bar Association Standards for the Defense Function. They represent the legal profession's own articulation of guidelines for the defense of criminal cases.

Specifically -- (1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client.

(2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. Many rights can only be protected by prompt legal action. The Supreme Court has, for example, recognized the attorney's role in protecting the client's privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (1966), and rights at a line-up, United States v. Wade, 388 U.S. 218, 227 [87 S.Ct. 1926, 18 L.Ed.2d 1149] (1967). Counsel should also be concerned with the accused's right to be released from custody pending trial, and be prepared, where appropriate, to make motions for a pre-trial psychiatric examination or for the suppression of evidence.

(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires

cert. denied, 393 U.S. 849 (1968).* It is sufficient for purposes of this case to recognize that counsel is constitutionally obliged to perform the following duties:

(1) "To see to it that all available defenses are proffered" and that all necessary actions are taken to preserve the rights of the defendant. United States v. Bennett, 409 F.2d 888, 899-900 (2d Cir. 1969), cited with approval in United States v. Ash, supra, 413 U.S. at 317

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that "all available defenses are raised" so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.

Id. Footnotes omitted.

* ... Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

Id.

United States v. DeCoster, supra, 487 F.2d at 1203-04 (D.C. Cir.); see also Beasley v. United States, supra, 491 F.2d at 696 (6th Cir.); United States ex rel. Saltys v. Adams, supra, 465 F.2d at 1028-29 (2d Cir.); United States v. Fisher, 477 F.2d 300, 304 (4th Cir. 1973); Moore v. United States, supra, 433 F.2d at 737-38 (3d Cir.);

(2) To interview and present available witnesses for the defendant. White v. Ragen, supra, 324 U.S. at 763; Beasley v. United States, supra, 491 F.2d at 691-96 (6th Cir.); United States v. DeCoster, supra, 487 F.2d at 1204 (D.C. Cir.); Gomez v. Beto, 462 F.2d 596, 597 (5th Cir. 1972).

(3) To make motions for the suppression of evidence where appropriate. United States v. DeCoster, supra, 487 F.2d at 1203 (D.C. Cir.); Saltys v. Adams, supra, 465 F.2d at 1028-29 (2d Cir.); Moore v. United States, supra, 432 F.2d at 738-39 (3d Cir. en banc).

(4) To conduct all appropriate factual and legal investigations to determine what defenses may be raised. Powell v. Alabama, supra, 287 U.S. at 71; Beasley v. United States, supra, 491 F.2d at 696 (6th Cir.); United States v. DeCoster, supra, 487 F.2d at 1204 (D.C. Cir.); United

States v. Fisher, supra, 477 F.2d at 202 (4th Cir.); United States ex rel. Marcelin v. Mancusi, supra, 462 F.2d at 46-48 (2d Cir., Kaufman, Chief Judge, dissenting); Gomez v. Beto, supra, 462 F.2d at 597 (5th Cir.); Moore v. United States, supra, 432 F.2d at 739 (3d Cir. en banc); Coles v. Peyton, supra, 389 F.2d at 226 (4th Cir.).

(5) To confer with the defendant "as often as necessary, to advise him of his rights and to elicit matters of defense." Coles v. Peyton, supra, 389 F.2d at 226 (4th Cir.); see also McMann v. Richardson, supra, 397 U.S. at 770-71; White v. Ragen, supra, 324 U.S. at 763; Powell v. Alabama, supra, 397 U.S. at 81; Beasley v. United States, supra, 491 F.2d at 696 (6th Cir.); United States v. DeCoster, supra, 487 F.2d at 1203 (D.C. Cir.); Bruce v. United States, supra, 379 F.2d at 121 (D.C. Cir.).

(6) To prepare adequately for all stages of the proceedings. Reece v. Georgia, supra; Powell v. Alabama, supra, 287 U.S. at 71; United States v. Fisher, supra, 477 F.2d at 302-04 (4th Cir.); United States ex rel. Marcelin v. Mancusi, supra, 462 F.2d at 46-48 (2d Cir., Kaufman, Chief Judge, dissenting); Moore v. United States, supra, 432

F.2d at 739 (3d Cir.); Coles v. Peyton, supra, 389 F.2d at 226 (4th Cir.).

The record in this case establishes that defense counsel failed to perform many of these essential duties. Most egregious, perhaps, was his failure to take even the rudimentary step of seeking at a suppression hearing to explore the facts pertaining to objectionable evidence which formed the bulk of the Government's case. Thus, defense counsel failed to seek such a hearing on the identification testimony of Garone and Gantt, the only two witnesses to identify Ms. Yanishefsky as the individual who had dropped the drugs. Yet both witnesses' identification testimony was indisputably the product of an impermissibly suggestive pre-trial photographic identification proceeding.

The display shown to each witness consisted of six pictures of women.* Two of these women (#A-2 and #A-5) had black or dark brown hair, and were therefore clearly not similar to the description either witness had given.** Two others (#A-3 and #A-4) had brunette hair, and in addition their names -- names other than Robin Yanishefsky*** -- were printed on the

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*These photographs are included in the record on appeal.

**Garone described the woman he had seen as "tall," "blond," and "white." Gantt described the woman only as "blond" and "white."

***Garone testified that he was informed by West Street officials that they suspected the women who dropped the drugs to have the name "Robin Yanishefsky."

front of the photograph, thus clearly eliminating them from consideration. The two remaining photographs (#A-1 and #A-6) were the only two depicting blond women. Yet even between these two, only one -- the photograph of appellant -- depicted someone with the Slavic features implicit in the name Yanishefsky. Clearly the photographs themselves were impermissibly suggestive. Moreover, Gantt, one of the two witnesses who was shown this display, testified that when he was unable to select one photograph as being the woman he had seen, the agents pointed out Ms. Yanishefsky's picture to him.*

Moreover, it is clear, even from the record as it presently exists, that neither Garone nor Gantt had an independent source for his in-court identification. Both had only a fleeting glance of the woman who allegedly dropped the drugs as she was walking away from where the witnesses were standing. According to Garone, he only looked at the woman <u>after</u> he saw the drugs drop to the floor, and then he only saw a "side face as she was going out" (56). He could describe the woman only as being "tall," "blond," and "white." Furthermore, when he was asked why he had selected appellant's photograph, Garone explained:

> ... I was looking for a tall blond woman and the <u>nearest</u> or the one was 6-A [the photograph of appellant], sir.
>
> (93).

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*The other witness was never asked whether the agents used similar tactics when he observed the photographs.

It appears from this testimony that Garone selected Ms. Yanishefsky's photograph because, of the six photos, the woman depicted in it was "nearest" to the woman he had seen at West Street. This, of course, is quite different from saying that Ms. Yanishefsky was, in fact, that woman.

Gantt's identification testimony was similarly suspect. He, too, had had only a fleeting glimpse of the woman who allegedly dropped the drugs. He described her only as "white" and "blond." Consequently, when Gantt was shown the same suggestive photographic display which had been shown to Garone, he selected the only two photographs of blond women (#A-1 and #A-6) as being similar to the woman he had seen. When he was unable to choose between these two women, the agents who were showing him the display pointed out appellant's picture as the woman they suspected. Even after Gantt was thus coached he was still unable, at trial, to say with any certainty that Ms. Yanishefsky was the woman he had seen.

In view of the questionable validity and reliability of the identification, and in light of the significance of the identification testimony, defense counsel's inexplicable failure to seek a suppression hearing, or even to object to the admission of this testimony, is by itself conclusive proof of incompetent representation, requiring reversal of this conviction. Saltys v. Adams, supra, 465 F.2d at 1028-29; see also the other cases cited for this principle at 31, supra. In Saltys v. Adams, supra, this Court reversed a conviction for

incompetence of counsel on virtually identical facts. There, as here, although the witnesses were subjected to arguably suggestive pre-trial identification procedures, counsel "failed to take even the rudimentary step of seeking at a suppression hearing ... to explore the evidence underlying the proposed in-court identification evidence." Id., at 1028. In reversing that conviction, this Court stated:

> ... We cannot see what conceivable trial strategy was followed in, or what tactical advantage could obtain to Saltys from, failing to object -- we might add with vigor -- on Wade and Gilbert grounds to the admission of the identification testimony.... By virtue of what we consider "woefully inadequate," United States v. Currier, 405 F.2d 1039, 1043 (2d Cir.), cert. denied, 395 U.S. 914 ... (1969), representation, key objectionable evidence, without which Saltys in all probability could not have been convicted, was admitted without objection.
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> Id., at 1029.

The same reasoning mandates reversal in the present case.

In similar fashion, defense counsel failed even to request a suppression hearing or to make any objection whatsoever to the admission of statements obtained from Ms. Yanishefsky following her arrest. These statements included the admission that Ms. Yanishefsky had been at West Street on the day of the alleged incident, that she smoked Kool cigarettes, and that she had had a package of Kool cigarettes in her possession when she visited the West Street facility. Defense

counsel failed to make any effort whatsoever to prevent the introduction of these admissions, despite the fact that Ms. Yanishefsky had informed him prior to trial that at the beginning of the interrogation which produced these admissions she had requested and been denied counsel. (See footnote at 16, supra). Here again, the failure even to seek a suppression hearing on objectionable evidence is conclusive proof of inadequate representation. See, e.g., Saltys v. Adams, supra.

Defense counsel's failure to conduct pre-trial investigations into matters pertinent to Ms. Yanishefsky's defense is yet further evidence of the inadequacy of his representation. For example, prior to trial, defense counsel realized the importance of locating and interviewing the visitors at West Street on the day of the alleged incident in an effort to locate someone who might have observed something relating to the incident and who might be able to give testimony exculpatory to the defendant. The importance of such an investigation was stressed by the testimony of all the witnesses at trial that there were at least three women in the sallyport at the time of the incident. Thus, prior to trial, defense counsel attempted to obtain the West Street facility's visitors' lists through "informal discovery" with the Government, but was turned down. Despite this refusal, and despite the fact that the Judge had expressly instructed counsel that he would be available during the week prior to trial if counsel had any difficulties with the Government in agreeing on discovery

of evidence,* defense counsel failed to make any motion to the Court to obtain these visitors' lists until December 3, 1973, the morning the trial began. At that time the Court granted defense counsel's belated request for the visitors' lists, and the Government apparently produced the lists later that day. However, despite the fact that defense counsel repeatedly stressed the potential importance of these visitors as witnesses for the defense (see, e.g., 2-4, 13-14), and despite the fact that he did not obtain the visitors' lists until the first day of this two-day trial, he failed to request any postponement to locate or interview these persons. Moreover, he apparently contented himself with sending out letters, either during or after trial, merely requesting these visitors to respond if they had any information concerning the alleged incident. In view of the limitations of defense counsel's investigative efforts, it is not surprising that none of the

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*When defense counsel appeared before the trial judge on November 16, 1973, he stated that he would engage in 'informal discovery" with the Government, but that "should motions become necessary I will make them very promptly." (Transcript of proceedings of November 16, 1973, at 3). Later in the proceeding, Judge Wyatt stated:

> ... I will say, Mr. Leavy [defense counsel], that on discovery and what not if you can't work it out with the Government I will make myself available next week.
>
> (Id., at 4; see also at 3).

The record and the docket sheets disclose that defense counsel made no motions on discovery or any other subject until December 3, 1973, the first day of the trial.

visitors was interviewed or called as a witness for the defense. In fact, none was apparently even reached by defense counsel until after the trial was concluded.

Similarly, when defense counsel attempted before trial to inspect the areas of the West Street facility where the incident had allegedly occurred, he was told by West Street officials that he would have to get a court order. Inexplicably, counsel failed to seek such an order, again ignoring the Judge's instruction to come in during the week before trial if there were any problems with discovery. Ironically, defense counsel did request such an order later, but only after the trial was concluded and the guilty verdict had been rendered. As the Court itself pointed out, the matter was rather "academic" at that point.

The duty to interview potential witnesses or to investigate possible defenses is so basic to defense counsel's responsibilities that the failure to perform these tasks is perhaps the most often-cited ground for concluding that an accused's right to effective representation has been violated. See, e.g., White v. Ragen, supra, 324 U.S. at 763; Beasley v. United States, supra, 491 F.2d at 691-96; see also the other cases cited for these principles at 31-32, supra. Here, defense counsel's belated post-trial efforts to locate witnesses and inspect the scene of the alleged crime -- investigations he could and should have carried out before trial -- were merely futile gestures which served only to dramatize both the apparent

significance of these investigations to Ms. Yanishefsky's defense and the incompetence of the attorney who failed to perform them in timely fashion.

Still further proof of inadequate representation is found in defense counsel's failure, despite the objections of Ms. Yanishefsky, to call Lucy Wilson as a defense witness. Ms. Wilson, who had accompanied Ms. Yanishefsky to West Street on the date of the alleged incident, would have testified to Ms. Yanishefsky's innocence of the crime charged. (See Ms. Yanishefsky's letter to Judge Wyatt, set forth as "C" to appellant's separate appendix). Defense counsel clearly was not unaware of Ms. Wilson's existence, since he made reference to her in his opening statement. His failure to call her was inexplicable, particularly in light of the fact that he presented no other evidence for the defense.* The failure to

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*The importance of presenting Ms. Wilson as a defense witness could scarcely be minimized in light of the Judge's statement, at the close of the Government's case, that he had doubts about some of the testimony given by the Government's witnesses, but that if he believed Officer Garone he would have to find Ms. Yanishefsky guilty.

The Judge's statement that, had Lucy Wilson testified he would have disbelieved her testimony because she was the sister of Roosevelt Bell, the inmate Ms. Yanishefsky was visiting at West Street, does not render counsel's failure to call this witness harmless error. First, the Judge made this statement after the trial was concluded, and thus it served only to reinforce the verdict he had already rendered. Moreover, the Judge had no basis for making such a determination of Lucy Wilson's incredibility, since he had neither heard testimony nor observed her demeanor on the witness stand.

call the only witness available to the defense, over the defendant's own objection, has repeatedly been cited as proof of inadequate representation requiring reversal of a criminal conviction. See, e.g., White v. Ragen, supra, 324 U.S. at 763; Beasley v. United States, supra, 491 F.2d at 691-96; see also the other cases cited for this principle at 30-32, supra.

The record of the trial itself is replete with yet more examples of lack of preparation and "woefully inadequate" representation. Saltys v. Adams, supra. Only a reading of the statement of facts to this brief or the transcript of the trial proceedings will fully convey the magnitude of the Sixth Amendment violation which occurred in this case. A few further examples should be noted. Thus, although an opening statement is perhaps the one portion of the trial proceeding which counsel can fully prepare in advance, the conclusion of defense counsel's opening statement in this case was virtually incomprehensible:

> The defendant will attempt to show that there was a security leak [the hole in the Plexiglas plate] and that there was information through them that there was a security leak and something might come through. It would be entrapment and that security leak should have been repaired if there was knowledge that contraband might be passed through the break in the contraband at that point because many visitors from the outside without being searched pass that point and many inmates go into Room A. If in fact the prison officials knew that there was such a security leak anything could have been passed through that window.
>
> (14-15).

Further evidence of counsel's lack of preparation for trial came at the close of the Government's case, when counsel could say in his client's behalf only:

> I haven't prepared any motions,

> your Honor, but briefly I would make a motion that the Government has not made out a prima facie case for various reasons which I believe in terms of the identification of -- I don't think there is a need in fact to go into why, your Honor. All the evidence was presented today. I would so move.
>
> (176).

Thus, although apparently recognizing the flaws in the critical identification testimony, defense counsel failed, even at this late date, to articulate his objections. The Court denied the motion.

Moreover, during his opening statement and his examination of the Government's witnesses, defense counsel conceded vital facts on which the Government's proof was either controvertible or non-existent.* Finally, in his closing argument,

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*One of the central weaknesses of the Government's case, over which Judge Wyatt repeatedly expressed concern during the trial, was what motivation Ms. Yanishefsky could possible have had for dropping a packet of drugs into a room which inmates had no occasion to enter and, in fact, were forbidden to enter. Defense counsel's opening statement helped to fill in this gap in the Government's case by explaining to the Judge that inmates who had just had visitors would very often enter the room into which the drugs were dropped to wave good-bye or to get a last look at the visitor who would then be passing through the corridor on the other side of the Plexiglas plate (13). The Government presented no evidence of such a practice.

Similarly, during the cross-examination of Gantt, although the witness insisted he had not seen the blond woman drop the cigarette package, defense counsel repeatedly assumed he had (142, 144), thus unnecessarily conceding that factual issue. Thus, in cross-examination, defense counsel asked Gantt:

> Q. And you just said that one of those women put the pack of Kools --

counsel seemed to concede even the guilt of his client:

> I think what the Government is asking the defendant to do in this case, your Honor, is presenting the defense with an eyewitness testimony, forcing the defendant to take the stand and say that never happened. If in fact, your Honor, the defendant takes the stand and through cross-examination loses a case because it never happened the way the Government said it happened, it happened an entirely different way, then the defendant is in fact proving the Government's case by testifying against herself and is forced to do that because the Government comes up with perjured testimony about an eyewitness identification. I think that's abhorrent, your Honor.
>
> (185). Emphasis added.

The right to the effective assistance of counsel is especially significant, since it is through counsel that a defendant asserts most of his other constitutional and legal rights. United States v. DeCoster, supra, 487 F.2d at 1201. By virtue of the inadequate representation provided for Ms. Yanishefsky in the trial below, she was denied not merely her

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> A. [By Gantt] I didn't say anything like that.
>
> (142).

Yet moments later defense counsel, assuming the fact Gantt had just denied, asked:

> Q. How soon after you saw this white woman drop the cigarettes or throw the cigarettes did Gate 1 open?
>
> (144).

Sixth Amendment right, but many of her other rights as well. The question of prejudice is irrelevant to this case:

> ... The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.
>
> Glasser v. United States, supra, 315 U.S. at 76.

See also Beasley v. United States, supra, 491 F.2d at 696. However, the prejudice to this appellant is readily apparent. The Government's case was exceedingly weak, relying as it did on two highly questionable eyewitness identifications. Moreover, although the Government had the FBI run fingerprint tests on most of the exhibits, the only fingerprints found were not the fingerprints of Ms. Yanishefsky. The defendant never confessed to the crime charged -- to the contrary, she maintained her innocence even at sentencing (201). Finally, the Judge himself, on several occasions, expressed the opinion that certain critical testimony by government witnesses "doesn't make much sense" (30, 176, 180), and finally convicted only because defense counsel had failed to give him any reason to doubt the testimony of the government witnesses (176, 180, 186).

This was not a case where the defendant had clearly committed the crime with which she was charged. To the contrary, competent counsel could quite effectively have raised a substantial question as to Ms. Yanishefsky's guilt. On the day of the incident, officer Garone and inmate Gantt could

only describe the woman they had seen as tall, blond, and white. West Street officials then asked the visiting room officer what inmate had had a blond visitor that afternoon. In all likelihood there were a number of visitors at West Street that afternoon who met that description. The fact that the visiting room guard remembered that one visitor meeting that description was Ms. Yanishefsky does not mean that she was the same blond woman who had dropped the drugs. Thereafter, it was only natural that officer Garone, being presented with a photographic display and then a courtroom situation where the only blond, white woman who might have the name Yanishefsky was appellant, would select her from among his limited choices. Inmate Gantt's identification tes-testimony was so uncertain as to be discounted altogether.

Absent this identification testimony, all the other evidence presented by the Government was consistent with the fact that Ms. Yanishefsky was an innocent visitor at West Street that day who, like many other women, happened to be blond and white, and in this limited respect, resembled the woman Garone and Gantt believed had dropped the drugs. Thus, the weakness of the Government's case rendered defense counsel's failure to protect appellant's rights or assert her defenses even more egregious. Glasser v. United States, supra, 315 U.S. at 67.

Competent counsel would have sought to suppress the eyewitness identification. He would also have sought to sup-

press the statements elicited from Ms. Yanishefsky in violation of her Fifth and Sixth Amendment rights. He would have called Lucy Wilson to attest to Ms. Yanishefsky's innocence, and he would perhaps have located other witnesses for the defense among the visitors at West Street on the day of the alleged incident. He would have inspected the scene of the crime before trial, and during trial he would have been careful not to concede controvertible facts or make incomprehensible arguments which served only to confuse the Court. He would have argued his client's innocence, rather than seeming to concede her guilt. In short, he would have raised all available defenses for his client at every stage of the proceedings. The accused in this case was constitutionally entitled to no less. United States v. Ash, supra, 413 U.S. at 317; United States v. Bennett, supra, 409 F.2d at 899-900; see also, e.g., Saltys v. Adams, supra; United States v. DeCoster, supra; Beasley v. United States, supra.

Because the defendant was denied her constitutional right to effective assistance of counsel, her conviction must be reversed and the case remanded for a new trial.*

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*Appellant urges that the record as it now exists clearly established that she was denied her constitutional right to counsel. If this Court should find that the present record is insufficient to enable it to make a determination on this issue, however, the Court should remand the case to the District Court for a hearing to amplify the record on this issue. DeMarco v. United States, 42 U.S.L.W. 3250 (Sup.Ct. March 18,

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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1974); United States v. DeCoster, supra, 487 F.2d at 1204; see also United States v. Echavarria, 2d Cir. Doc. No. 73-1054; United States v. Charles, 2d Cir. Doc. No. 73-1647. At such a hearing evidence could be presented pertaining to the fact that Ms. Yanishefsky informed defense counsel prior to trial that she had been denied her request for counsel when she was interrogated, the nature of the testimony Lucy Wilson would have given in Ms. Yanishefsky's defense, the failure of defense counsel to make pre-trial investigations, his failure to move to suppress objectionable evidence, the reason why he advised Ms. Yanishefsky to waive her right to a trial by jury, and other matters.

Certificate of Service

May 17, 1974

I certify that a copy of this brief and appendix has been ~~mailed to~~ delivered to the United States Attorney for the Southern District of New York.

Michael A. Hoffman